IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 449

REGULAR COMMON CARRIERS CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,

*Appellant,*

v.

HANCOCK TRUCK LINES, INC.,

*Appellee.*

ON APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF INDIANA

## BRIEF FOR APPELLEE

JACOB WEISS,
8 East Market St., No. 512,

ALBERT WARD,
8 East Market St., No. 318,

FERDINAND BORN,
718 Chamber of Commerce Building,

All of Indianapolis, Indiana,

*Attorneys for Appellee.*

## INDEX

## CITATIONS

CITATIONS—Continued.

CITATIONS—Continued.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 449

REGULAR COMMON CARRIERS CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,

*Appellant,*

v.

HANCOCK TRUCK LINES, INC.,

*Appellee.*

ON APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF INDIANA

## BRIEF FOR APPELLEE

### JURISDICTION

Appellee filed its verified complaint in the Indianapolis Division of the District Court of the United States for the Southern District of Indiana, on March 29, 1944, to set aside, in part, an order made by the Interstate Commerce

Commission; Judge Baltzell, the District Judge, immediately called to his assistance to hear and determine the application two other Judges; the trial court, when assembled, consisted of Honorable Sherman Minton, of the Seventh Circuit Court of Appeals, Honorable Luther M. Swygert, of the Northern District of Indiana, and Honorable Robert C. Baltzell, of the Southern District of Indiana (R. 53); the court acted with expediency; the evidence was heard on April 8 (R. 89); the case was orally argued on April 28 (R. 65); findings of fact and conclusions of law, pursuant to Rule 52 of the Federal Rules of Civil Procedure, were signed and filed on May 25, 1944 (R. 65), and the final decree was entered on May 25, 1944 (R. 74). The petition for appeal was not filed until July 22, 1944.

The jurisdiction of this Court is denied by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220, Section 47, Title 28 U.S.C.A. Under such Act, the appeal had to be taken within thirty days after May 25, 1944, and the appeal had to be presented to, and acted upon, by the statutory three judge court which tried the cause.

In addition to the foregoing reasons, this appellant has no standing in this Court, because it is not "an aggrieved party" within the meaning of Section 47-a upon which it relies for jurisdiction; it filed no pleadings below, except its petition to intervene; it tendered no issue; it adopted none of the pleadings which were filed by the parties to the litigation; it is not a party to the judgment (R. 74); its mere appearance before the Interstate Commerce Commission did not authorize it to thereafter appear in either the District Court or this Court; Section 17 (9), of Part I of the Interstate Commerce Act gives it no right to appear in an action and has no bearing on this appeal; consequently,

no substantial question is presented by its appeal. *Pittsburgh & W. Ry. Co. v. United States* (1930), 281 U. S. 479.

Nor has appellant made any explanation of the position adopted by it in the lower court that its time for appeal had expired before July 1, 1944.

These questions are presented by appellee's Statement Opposing Jurisdiction of this Court, filed on August 2, 1944, and which has been separately bound as a part of the record in this appeal.

## CORRECTED STATEMENT OF THE CASE

The failure of appellant to make a concise statement containing all that is material to the consideration of the questions presented, will necessitate the making of a corrected statement by appellee, and such corrected statement, taken largely from the findings of fact, found in the Record between pages 65 and 73, is as follows:

On or about the 29th day of January, 1936, Globe Cartage Company, Inc., filed its written application with the Commission under the grandfather clause of Section 206, Part II of the Interstate Commerce Act, Section 306, Title 49 U. S. C. A., duly alleging that it was in fact in bona fide operation as a common carrier by motor vehicles on June 1, 1935, over the routes and within the territory for which such application was made by it, and had so operated since that time down to the filing of its application; such application was numbered MC-3339, was designated as application of Globe Cartage Company, Inc., Common Carrier Application, and after the rights of Globe were taken over by appellee as hereinafter shown, it was designated by the Commission as No. MC-25567 (Sub. No. 8), Hancock Truck

Lines, Inc., successor to Globe Cartage Company, Inc.; therein it requested the Commission to give and grant unto it a certificate of convenience and necessity, under and pursuant to said grandfather clause, such application for such certificate having been made by it to the Commission in all respects as provided for in Paragraph (b) of Section 206, of Part II of the Interstate Commerce Act aforesaid, and within 120 days after October 1, 1935 (R. 66-67).

While said application of Globe Cartage Company, Inc., was thus pending before the Commission, the Hancock Truck Lines, Inc., and said Globe Cartage Company, Inc., filed and presented to the Commission their joint application asking an authorization for the purchase by the Hancock Truck Lines, Inc., of all of the common carrier operating rights of Globe which were involved in said application; a hearing was had and a finding and order were made by the Commission on May 16, 1942, authorizing such purchase; when said joint application was first filed, Hancock had only paid Globe $100 on the purchase price, but had agreed to pay an additional $2,500 upon approval of such transaction by the Commission, $2,500 upon final approval by the last concerned State regulatory authorities, and $4,900 within ten days thereafter; as a justification for such authorization order, the Commission found that approximately 65% of Globe's traffic consisted of business handled for Universal Carloading and Distributing Company, a freight forwarding company, and as a result of handling such business the flow of traffic for Globe was unbalanced, necessitating the dead-heading of equipment, especially from St. Louis east; it found, on the other hand, that Hancock enjoyed heavier traffic east out of St. Louis than in the reverse direction; the Commission found that, with some exceptions not material herein, Hancock's regu-

lar route operations were over routes duplicated by those claimed by Globe, the latter's operations, however, being considerably more extensive; both carriers were found to be serving Louisville, Evansville, Indianapolis, Vincennes, Terre Haute, Detroit, St. Louis, and Chicago, among other points, and maintained duplicate terminal facilities at a number of such common points; Globe did not believe that it would be justified in expending additional funds to develop a better balanced operation, and, as its functions and facilities substantially duplicated those of Hancock, the desired result could be accomplished through the unification of the operations in Hancock; the Commission found that such unification would result in better balanced lading between the common points served, principally between Louisville and Chicago, Chicago and St. Louis, and St. Louis and Indianapolis, and would provide Hancock with shorter routes; Hancock was found to have the necessary organization to conduct the additional operations and it would meet any increased equipment demands either by leasing or purchasing the same; the Commission found that savings through consolidation of overlapping functions, including terminal and pick-up and delivery facilities, application of Hancock's lower insurance rates, reduction in truck miles operated empty, and through increasing the use factor of vehicles operated by transporting heavier loads, were estimated to be in excess of $50,000 annually, approximately $20,000 of which represented the estimated cost to Globe, if it remained in operation, in developing additional business to balance its present lading; the Commission found that the proposed unification was in line with its purpose of encouraging corporate simplication in the interest of economical and efficient transportation.

The Commission further found that the purchase by Hancock of the common carrier operating rights of Globe,

upon the terms and conditions set out in the order, which terms and conditions were found by the Commission to be just and reasonable, was a transaction within the scope of Section 5 (2) (a), Part I of the Interstate Commerce Act, and would be consistent with the public interest, and, pending determination of Globe's "grandfather" applications in Nos. MC-3339 and MC-3340, Hancock should conduct the common carrier operations lawfully conducted under the "grandfather" clause pursuant to those applications, and Hancock would be entitled to a certificate covering any "grandfather" common carrier rights which might be confirmed as a result of those applications, which rights the Commission, by its said order of May 16, 1942, authorized to be unified with rights otherwise confirmed in Hancock, with duplications eliminated; an order was thereupon entered by the Commission conforming to such findings (R. 70-71-72); such order is specifically referred to in paragraphs 13 and 18 of appellee's complaint (R. 5, 8, 9), and the order is set out on pages 99 to 105 of the Record.

Throughout the period of appellee's corporate existence, it has been a common carrier by motor vehicles, holding itself out to the general public to engage in the transportation by motor vehicles in interstate and foreign commerce of general commodities, with certain usual exceptions, for compensation, and it has been the holder of certain certificates of public convenience and necessity issued to it by the Commission, different from the certificate and order of the Commission complained of in the complaint (R. 66).

In reliance upon said findings and order of May 16, 1942, the appellee completely unified the common carrier operating rights of Globe which were to be confirmed by

the Commission as the result of its grandfather applications as aforesaid, with rights otherwise confirmed in Hancock, with duplications eliminated, which rights at that time were the common carrier rights of Hancock pursuant to its certificates of public convenience and necessity theretofore granted to it by the Commission, and it thereafter continued to operate under said order of unification up to the time of the trial and to the extent and in the manner as set out in Paragraph 18 of its complaint (R. 72).

Following the findings and order of the Commission of May 16, 1942, appellee, in reliance upon such findings and order, paid to Globe said $9,900 as the balance of the purchase price for such common carrier operating rights (R. 72).

The proceedings in Cause No. MC-3339 of Globe Cartage Company, Inc., Common Carrier Application, remained pending before the Commission until as of August 4, 1943, on which date the Commission found as a fact that Globe Cartage Company, Inc., had been engaged in bona fide operations, without interruption, since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities (i. e., freight and commodities of every class, type and character), except commodities in bulk and those of unusual length, height or weight; it further found as a fact that Globe Cartage Company, Inc., was a common carrier by motor vehicle, and further found that the Commission could not, consistently with Globe's common carrier status, restrict its services to particular shippers; the Commission further found as a fact that Globe Cartage Company, Inc., was a common carrier and entitled to authority to continue operations as such, and that the Commission was without

power to restrict or limit its operations in a manner which would change its status from that of a common carrier (R. 68).

Contrary to such findings of the Commission, it did place restrictions in said order of August 4, 1943, and therein limited the transportation to be performed in the future by appellee to those general commodities which are at the time moving on bills of lading of freight forwarders (R. 68-69).

A petition to modify the effective date of the order was filed, but the order became a final one as of March 31, 1944 (R. 69).

All of the common carrier operating rights of Globe Cartage Company, Inc., in said cause No. MC-3339 were acquired by appellee, under and pursuant to the order of the Commission on May 16, 1942, and appellee is the sole party in interest and will be the sole owner of such certificate as is issued in said proceeding (R. 69).

The appellee, as such common carrier of property by motor vehicles, has, and does provide safe and adequate service, equipment, and facilities for the transportation of property consisting of general commodities in interstate and foreign commerce, and established, observed and enforced just and reasonable rates, charges and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate and foreign commerce, and has fully complied with all the rules and regulations of the Commission in relation thereto insofar as they are in effect

at this time, and as such common carrier it is prohibited by law from making, giving or causing any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, district, territory, or description of traffic, in any respect whatsoever, and as a common carrier it is bound by law to receive and transport such general commodities as are offered to it for transportation by either the owners or their agents for transportation, and to carry them on the routes which it operates (R. 70).

If that part of the order complained of by the appellee is enforced, all of the business which appellee has built up under said unification order of May 16, 1942, will be destroyed, and appellee will be put back to the position which Globe was in when said order was entered, namely, maintaining duplications in terminals and facilities, handling an unbalanced lading, dead-heading of equipment, its savings in excess of $50,000 per year through consolidation of overlapping functions, including terminal and pick-up delivery facilities, reduction in truck miles operated, and the use of vehicles operated by transporting heavier loads, will all be lost to it, and it will suffer and sustain immediate and irreparable injury, loss and damage on account of the enforcement of the part of said order complained of herein (R. 72).

The Commission made no finding that the restriction complained of by the appellee is a reasonable term, condition or limitation required by the public convenience and necessity; nor has it found as a fact that it would be consistent with the public interest and just and reasonable to place such restriction in said order; nor has it found that good cause exists for changing its said order of May 16, 1942 (R. 73); that part of the order complained of by appellee herein is not sustained or justified by any

fact found by the Commission, and there is no rational basis for its support; said part of the order is discriminatory against the appellee and is an arbitrary, unreasonable, and capricious restriction upon the rights, duties and privileges of appellee as a common carrier of general commodities by motor vehicle for compensation, and will deprive appellee of its rights and property without due process of law (R. 73).

For convenience, we set out at this point the Commission's order of August 4, 1943, insofar as it affects our question, and have italicized the particular words complained of in this action:

> "On reconsideration, we find that applicants are entitled to certificates authorizing operations by them as common carriers of general commodities (except commodities in bulk or those of unusual length, height or weight) *which are at the time moving on bills of lading of freight forwarders*, between the points and in the manner described in the findings in the prior reports" (R. 45).

(The order affects an additional carrier whose application is covered thereby, and who is not involved herein.)

Appellee brought this suit to set aside the italicized part of said order, alleging, in substance, that: inasmuch as the Commission had found as a fact that appellee was a common carrier of general commodities by motor vehicle as defined by the grandfather clause of the Interstate Commerce Act, it was then the statutory duty of the Commission to issue to it a certificate, "without further proceedings" as expressly provided for by Section 206 (a) which says that

> "If any such carrier or predecessor in interest was in bona fide operation as a common carrier by

> motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, • • • the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings."

That the inclusion of said limitation in said order is an unlawful and illegal restriction against and constraint upon appellee, not authorized by law, and is an unjust, unreasonable, and capricious limitation upon its rights, privileges and duties as a common carrier of general commodities by motor vehicle, and will deprive appellee of its rights and property without due process of law and in violation of the Constitution of the United States and the Fifth Amendment thereto; such limitation is an ambiguous, indefinite, and inconsistent provision wholly unauthorized by law, and not sustained or supported by any fact found by the Commission, and is an arbitrary and unlawful discrimination against appellee as a common carrier by motor vehicles, and is contrary to public policy (R. 1-11).

Upon appropriate special findings of fact (R. 65-73), the trial court stated its conclusions of law as follows:

> "One. The Court has jurisdiction of the subject matter, and of the parties, in this cause of action.
>
> "Two. That part of the order complained of in the complaint which limits plaintiff's operations as a common carrier of general commodities to those which are at the time moving on bills of lading of freight forwarders is illegal and void, and the defendants should be permanently enjoined from enforcing the same" (R. 73).

In conformity with such conclusions, the final decree appealed from herein was entered on May 25, 1944 (R. 74).

## SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

On page 10 of appellant's brief it is said that it will urge certain errors assigned by it, the first one being: the court erred,

> "In not dismissing plaintiff's complaint".

There is no further discussion of this assignment and we fail to find anything in the record which shows that appellant in any manner presented this question to the lower court. Alleged error No. 4 is:

> "In refusing to adopt the findings of fact and conclusions of law submitted by the defendants".

We do not understand that appellant claims it submitted any findings or conclusions of law; the reference which it makes to the Record on pages 146 and 147 has application only to findings and conclusions submitted by the defendants United States and Interstate Commerce Commission.

These claimed errors properly illustrate our position that a stranger to the judgment should not be permitted to appeal and urge questions in this Court with which it had no concern in the lower court.

Alleged error 16, page 12, that the court erred in failing either in an opinion or in its findings of fact or conclusions of law to state reasons for its decision or for its final decree, is not argued nor supported by any authority. Findings of fact and conclusions of law were signed and filed (R. 65-73), pursuant to Rule 52, Federal Rules of Civil Procedure, and it seems clear therefrom that the final decree of the court was based upon its conclusion of law that the restriction complained of in the order is illegal and void,

and both the conclusions of law and the decree are supported by findings of fact which show that the Commission's order will deprive appellee of its property without due process of law.

A written opinion is not required of the lower court, either by any Rule, or by law; as stated by Judge Woolsey in *Penmac Corp. v. Esterbrook Steel Pen Mfg. Co.*, D. C. (1943), 27 Fed. Supp. 86-87:

> "It is now a work of superrogation to write a considered and detailed opinion on the facts in what used to be an equity cause and is now called a non-jury cause, for the place of the opinion must now be taken by the formal findings of fact and conclusions of law, separately stated and numbered."

See also District Judge Nevin's Opinion in *O'Leary v. Liggett Drug Co.* (1943), (S. D. Ohio), 53 Fed. Supp. 288; *St. Paul Fire & Marine Ins. Co. v. Tire Clearing House* (1932), 58 Fed. (2), 610 (8 C. C. A.).

Alleged error 17, on page 12, of appellant's brief complains of the court's finding of fact No. 2, which states, among other things, that appellee's action arose under the Fifth Amendment; it is difficult to see how this injured appellant in any manner, as it admits on page 2 of its brief that

> "This action arises under the Fifth Amendment to the Constitution of the United States", etc.

Other errors assigned will be discussed later in this brief, following the points outlined in Appellant's Summary of Argument, but we should state here that all of the remaining ones depend for their vitality upon getting the Court to disregard the Commission's Order of May 16, 1942, as suggested in alleged error No. 8, page 11, of its brief.

## SUMMARY OF ARGUMENT

1. Appellant has not shown that it was a party to the judgment below; nor that it filed any pleadings or tendered any issue in the trial court; it therefore has no standing in this Court, and its appeal should be dismissed.

*City of Chicago v. Chicago Rapid Transit Co.* (1931), 284 U. S. 577;
*Atles v. U. S.* (1931), 50 Fed. (2) 808 (3 C. C. A.).

2. Appellant has wholly failed to present, argue, or discuss the jurisdictional question raised by our Statement Opposing Jurisdiction, and it has thereby waived its right to have this appeal considered on the merits.

Rule 7 (3);
Rule 27 (2-c) (7).

3. This appeal was not taken within the time prescribed by statute; the judgment was rendered on May 25th and the petition for appeal was not filed until July 22, 1944 (R. 74); it had to be taken within 30 days from the date of final judgment; that part of the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220, Section 47, Title 28 U.S.C.A., under which this case was tried, and which has direct application to this question, provides as follows:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; *and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges*

*and the same procedure as to expedition and appeal shall apply''* (emphasis supplied).

4. A single judge of the statutory three judge court which was assembled to hear and determine this cause could not act upon or grant a petition for an appeal; said Section 47 provides that no injunction shall issue against any order of the Commission,

> ''Unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges''.

5. The Commission, having authorized the unification of appellee's operating rights with those of Globe, by its finding and order of May 16, 1942, could not revoke, change or set aside such unification order without notice to appellee, and a finding that the proposed change is ''consistent with the public interest'', is ''just and reasonable''; and that good cause has been shown for such change; this restriction upon the Commission is found in clause (9), Section 5 of the Interstate Commerce Act, which provides that:

> ''The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate''.

The Commission made no finding that good cause existed for changing said order of May 16, 1942 (R. 73).

The restriction in the order complained of by appellee, having been made without notice, and without a hearing, is violative of the Fifth Amendment.

(The following points relate specifically to appellant's summary of argument, pages 13-14 of its brief; its numbers being in parenthesis.)

6. (1) The facts of record before the Interstate Commerce Commission in application of Globe Cartage Company, Inc., Docket No. M. C. 3339, fully sustained the *findings made by the Commission* that Globe was a common carrier on June 1, 1935, within the provisions of the grandfather clause of Section 206 of the Interstate Commerce Act, Section 306, Title 49, but *the facts found do not sustain the order made by the Commission.*

The Commission, having found that Globe was a common carrier, the limitation in the order of appellee's operations to the transportation of general commodities moving on bills of lading of freight forwarders, is an unlawful restriction of the duties and rights of appellee as a common carrier of such general commodities, and a violation of Section 206 and 216 (a) (d), Part II, Interstate Commerce Act, Section 206, 316, 49 U.S.C.A.

7. (2) The findings and order of Division 4 in the consolidation proceedings between Globe and appellee, in Cause M. C.-F.-1743, were adopted as the findings of the Commission, and upon such findings the Commission predicated its order of May 16, 1942 (R. 104); the Commission, having expressly authorized the consolidation of appellee's then existing common carrier rights under other certificates then held by it, with the common carrier rights held by Globe in Cause No. M.C. 3339, and having required such joint operation to be carried on by appellee from May 16,

1942, to August 3, 1943, thereby created and established certain vested property rights in appellee which cannot be taken away from it by the present order entered in a collateral proceeding, limiting its transportation of general commodities to such only as are moving on bills of lading of freight forwarders; such part of the order complained of will take appellee's property without due process of law, in violation of the Fifth Amendment, and is a violation of Sections 206 and 216 (a) (d), Part II of the Interstate Commerce Act, Sections 306 and 316 (a) (d) of Title 49, U.S.C.A.

8. (a) The Commission's order of May 16, 1942, was entered pursuant to Section 5 of the Interstate Commerce Act, and therein the Commission determined that the question of consolidating the common carrier rights of Globe with the common carrier rights of appellee was "consistent with the public interest"; it found that "the proposed unification was in line with its purpose of encouraging corporate simplification in the interest of economical and efficient transportation", and that the "terms and conditions were found to be just and reasonable"; rights so created by an order entered pursuant to Section 5 cannot be taken away from appellee and destroyed by the Commission pursuant to Section 206 (a); such procedure would violate the provisions of the Fifth Amendment, be clearly contrary to the express provisions of Section 206 (a), and be violative of Section 5.

9. (b) The Commission is bound by the same rules of estoppel which control individuals, and the rights of the parties must be determined upon the fixed principles of justice which govern between man and man in like situations: *United States v. Stinson* (1905), 197 U. S. 200; *Walker v. U. S.* (1905), 139 Fed. 409; *U. S. v. Denver*

(1926), 16 Fed. (2) 374 (8.C.C.A.); *State of Iowa v. Carr* (1911), 191 Fed. 257 (8 C. C. A.).

10. (3) The Commission had neither power nor authority under Section 206 (a), Part II of the Interstate Commerce Act, to limit appellee's operating authority as a common carrier by Motor vehicle to transportation of general commodities "which are at the time moving on bills of lading of freight forwarders"; having found, as it did, that appellee's precedessor Globe had been engaged in bona fide operations, without interruption, since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities (i.e. freight and commodities of every class, type and character), and that it was a common carrier by motor vehicle (R. 68), the statute then expressly provided that

> "the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings". Section 206, supra; Section 306, Title 49 U.S.C.A.

11. (4) The Commission had no power or authority to limit the operations of appellee (a common carrier—not a contract carrier) to the transportation of general commodities moving on bills of lading of freight forwarders, unless it found as a fact that such limitation was reasonable and was required by the public convenience and necessity; Section 208, Part II of Interstate Commerce Act; Section 308, Title 49 U.S.C.A. The Commission did not find that such limitation was reasonable, or required by the public convenience and necessity (R. 73); it could not make such finding under section 206 (a), which provides that if the Commission finds the applicant was bona fide

engaged as a common carrier, a certificate must be issued "without further proceedings".

12. (4) The Court below did not substitute its judgment for that of the Commission:

(a) There was no suggestion in the lower court that the proceedings should be remanded to the Commission; such procedure was wholly unnecessary and clearly improper; the Court could and did strike out the void part of the order complained of, and the Commission could have done no more.

(b) The lower court did not make findings of fact contrary to the record made before the Commission; the court did properly conclude that the Commission had erred in its application of the law to the undisputed facts.

13. The attempt of the Commission to freeze appellee to the transportation of general commodities which are moving on bills of lading of freight forwarders, alters very materially the basic characteristics of the service which appellee has been rendering (that of a common carrier) since the unification Order of the Commission of May 16, 1942, arbitrarily confiscates its property without due process of law, without the basis or essential findings of convenience and necessity therefor, and is a gross violation of appellee's constitutional and statutory rights.

*United States v. Carolina Freight Carriers Corp.* (1942), 315 U. S. 475.

## ARGUMENT ON JURISDICTION

We have not been able to distinguish the present appeal from that of *City of Chicago v. Chicago Rapid Transit Co.*,

284 U. S. 577, where this Court dismissed a separate appeal taken by the City of Chicago, because it had no separate standing which gave it any right to appeal. Here, as there, the appeal is separate.

Nor do we think a stranger to the judgment below has any right to appeal; especially, where such stranger wholly fails to show that it filed any pleadings, or tendered any issue in the court below, and has not shown that it was recognized as a party to the proceedings in the court below. An appellant against whom no decree was entered, and who is not shown to have any interest, has no standing on appeal. *Atles, et al. v. United States* (1931), 50 Fed. (2) 808 (3 C.C.A.).

Appellant has waived its right to be heard in this cause; our Statement Opposing Jurisdiction in this Court was filed on August 2, 1944; no answer has ever been made thereto by this appellant, although Rule 7 (3) clearly contemplates that when a jurisdictional question is presented as provided by Rule 12, paragraph 3, the appellant shall file a brief opposing the same; Rule 27 (2-c) contemplates a concise statement on which the jurisdiction of this Court is invoked; the mere reference to apparent conflicting statutes bearing upon such jurisdiction does not satisfy the Rules of this Court; under Rule 27 (7), the appellant, being in default, the Court should decline to consider its appeal, and the judgment should be affirmed.

## GRANTING OF APPEAL BY SINGLE JUDGE

We deem it unnecessary to set out herein any of the matters appearing in appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, which was filed

pursuant to paragraph 3 of Rule 12; the statement has been separately printed and we understand it to be a part of the record; we respectfully urge that our position is well founded and believe this Court has no jurisdiction of this appeal.

Appellant has not seen fit to touch upon the jurisdictional questions presented by appellee; it has made no response to the implied invitation of this Court for a further discussion of this matter by its order of November 6, 1944; the mere reference on page 2 of its brief to Sections 47 and 47-a as sustaining the jurisdiction of this Court, is not a sufficient showing to justify this Court in assuming jurisdiction of appellee, in view of its jurisdictional statement.

Section 47 is a law of restriction and limitation upon the powers of a single district judge; it is a grant of power to three judges; whatever power a single judge has under this statute, must be found in the statute itself; if no rights are granted to a sole judge under the Act, then he can perform no acts alone.

Our position in this regard is justified by the reasoning and decision of this Court in *Ex Parte Metropolitan Water Co.* (1911), 220 U. S. 539, where the Court considered the effect of Section 266 of the Judicial Code, which creates a three judge court to hear suits to enjoin state statutes; true, the question there arose upon the granting of a temporary injunction, but, nevertheless, the Court very carefully pointed out that suits of this character should be heard before a court consisting of three judges, and not one judge alone, and that limitations are unequivocably placed upon the power of the single judge to act, and a single judge of a special statutory three judge court has no power to do any act which is not expressly given him by the act creating such court.

Congress recognized the propriety of such position when it passed the Act of April 6, 1942, 56 Stat. 199, expressly providing that a single judge might do certain acts, and specifically designated such acts, and very clearly provided that all such acts must be those which should be subject to review at any time prior to final hearing by the three judge court; it failed to give a single judge any power to act on matters occurring at, or subsequent to the final hearing; Congress, having legislated expressly upon the subject, after this Court had pointed out that authority for acts of a single judge must be found within the statute itself, and having failed to give a single judge any power to act subsequent to final judgment, it must be presumed that it did not intend to give a single judge any such power subsequent to final judgment.

We concede that the lower court could not sit in judgment on its own alleged errors, and deny an appeal because it thought there was no merit in the errors assigned, and to such extent it may be properly argued that the appeal was a matter of right. But this does not reach our question; this petition for appeal was not presented within the time fixed by law; *it was not presented until after appellant had filed a petition in the lower court asking the court to vacate its judgment of May 25th and render a new judgment of a later date so it could take an appeal within the time prescribed by the statute; it was allowed by a single judge;* these matters are judicial questions, and must be decided by the Court that tried the case.

In *Credit Co. v. Ark. Central Railway* (1888), 128 U. S. 258, it is said that:

> "An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is, in some way, presented to the

> court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the Appellate Court".

If the single judge had the right to grant the appeal, and decide that the appeal was taken in time, such act deprived the three judge court of its further jurisdiction; thereafter, the three judge court would have been denied the right to pass upon the question presented of vacating the judgment and re-entering it as of a new date.

Again, we refer to the decision upon this question as it relates to Section 266, Judicial Code, in *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Comm.* (1922), 260 U. S. 212, where the court says:

> "We are of opinion that a single judge has no power, in view of Section 266, to affect the operation of the order of the court constituted by the three judges granting or denying the interlocutory injunction applied for. To hold that he may grant a temporary injunction varying the order of the three judges would be to make the legislation a nullity and work the result which Congress was at great pains to avoid * * *. This is a question of statutory power and jurisdiction, not one of judicial discretion or equitable consideration.".

The Court further suggested that in cases of this character, the proceedings are special, "in which the power of a single judge is definitely limited".

In *Bartemeyer v. Iowa* (1871), 14 Wall. 26, this Court held that a writ of error signed by an associate justice of the Supreme Court of Iowa, composed of a chief Justice and three associates, was not sufficient to give the Court

jurisdiction of the cause; the Court differentiated between a court composed of a single judge and one composed of more than one judge.

*We think it will lead to confusion for this Court to hold that a single judge of a statutory three judge court can grant a petition for appeal, and thus oust the trial court of further jurisdiction, and cut off the right of three judges to pass upon the many questions which are apt to arise following the final judgment.*

GRANTING OF APPEAL AFTER EXPIRATION OF STATUTORY TIME

The matter of appeal is governed by a very short paragraph in Section 47 reading as follows:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; *and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply*" (emphasis supplied).

This is a statute of limitation upon the powers of a single judge, and upon the acts and conduct of the parties; the final hearing must be by three judges, and the same haste is required as to trial and appeal as is provided for in relation to the interlocutory injunction; appellant would have the Court read out of the state the words "the same requirement as to judges and the same procedure as to expedition and appeal shall apply"; it would strike down the command of Congress that where the Commission's

order has been finally set aside, the appeal must be taken in 30 days; appellant is not only compelled to strike out such quoted words from Section 47, but it is obliged to resurrect and rewrite Section 47-a, because it was repealed by the passage of the Act of February 13, 1925, 43 Stat. 936; resurrection was not deemed adequate; a re-write was necessary, and the words "in the cases specified in section 44 of this title" (28) were inserted, *not by Congress*, but apparently by the annotators of the code; we most earnestly urge that this repealed Act (47-a) cannot be thus revived and re-written by Code annotators, and then used in this Court to thwart the express mandate of Congress that appeals of this character must be taken in 30 days.

In *Smith v. Wilson* (1927), 273 U. S. 388, this Court held that the repealing Act of February 13, 1925, 43 Stat. 938, cited and relied upon by appellee above, and on page 6 of its Statement Opposing Jurisdiction, was so broad that a special amendment to Section 266 of the Judicial Code was necessary to save and provide for appeals direct to this Court under said section.

That our position in this regard is sound, is further clearly evidenced by the declarations and conduct of the appellant below; with due deliberation, it went into the lower court on July 5, 1944, and filed its petition, sending a copy thereof to each of the three judges (Statement 17), and asked them to set aside their judgment of May 25, and re-enter it as of July 1, the only reason assigned being,

> "(5) That the time for taking an appeal from the judgment of this Court had elapsed when notice of judgment was received" (which was July 1, 1944). (See Statement 17-18.)

This particular appellant had failed to appoint counsel resident in Marion County, as required by a local court rule,

and claimed it was not notified of the lower court's judgment until July 1 (Statement 15); *it was then reading the appeal statute the same as appellee; it then understood the appellate provisions of the law the same as appellee understands them;* in fact, in so far as we know, it is still of the same opinion.

Judging from the only constructive declaration it has made upon the question of jurisdiction, it will have to be aligned with appellee in asserting that the time for appeal had expired, because, although jurisdiction has been challenged ever since August 2, 1944, and this Court, on November 6, 1944, was especially considerate and postponed the decision of the ques ion of jurisdiction to the hearing on the merits, undoubtedly to give the parties further opportunity to brief the question, yet, this appellant has never explained why it went into the lower court on July 5th and tried to convince the three judges that the time for appeal had then expired; this Court is now confronted with the very unusual and aromalous situation of two appellants appealing from the same judgment, one claiming in Cause 448 that the appeal was taken in due time, and the appellant herein having claimed in the lower court that the time for appeal had expired, and now offering no explanation to this Court for such position.

## ARGUMENT ON THE MERITS

If the Court concludes to pass upon the merits of this appeal, then it becomes necessary to consider appellee's statement of the questions actually presented; appellant does not present the case that was tried below, nor state the question which must be decided in this appeal.

QUESTION ACTUALLY PRESENTED

The Commission found as a fact that Globe was in bona fide operation as a common carrier by motor vehicle since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities of every class, type and character (with certain exceptions as to bulk, etc.), within the provisions of the grandfather clause, Section 206 (a), Part II of the Interstate Commerce Act; *having made such finding, it thereupon became the mandatory duty of the Commission to grant appellee, as Globe's successor, an unlimited certificate of convenience and necessity under Section 206 "without further proceedings"; failing so to do, the Commission has clearly misapplied the law to the facts found by it.*

In addition, there are very cogent legal and equitable reasons, arising from and growing out of the order made by the Commission on May 16, 1942, which impel the affirmance of this judgment.

## ORDER OF MAY 16, 1942

In order to better understand our contention concerning the consideration to which appellee is entitled by reason of the peculiar facts in this record, we call to the Court's attention the substance of certain undisputed facts which were found by the Commission, and upon which it predicated its order of May 16, 1942, which directly affected appellee, and operated upon its property rights which are involved in this proceeding; for this purpose, reference is now made to pages 100 to 104 of the Record, from which we summarize the following facts:

Hancock Truck Lines, Inc., of Evansville, and Globe Cartage Company, Inc., of Indianapolis, by

joint application filed December 23, 1941, asked for authority under Section 5 for purchase by the former of operating rights of the latter for $10,000; on June 10, 1940, the Commission had issued an amended certificate to Hancock authorizing operations in interstate or foreign commerce as a motor vehicle common carrier of general commodities (a) over regular routes, serving specified intermediate and off-route points between Evansville and Chicago, Illinois, via Vincennes and Terre Haute, Indiana, between Evansville and Henderson, Kentucky, between Evansville and Louisville, Kentucky, between Vincennes and St. Louis, Mo., between Terre Haute and Indianapolis, Indiana, and between Evansville and Detroit, Michigan, via Vincennes, Indianapolis, Ft. Wayne and Angola; under rights confirmed by the Commission, Hancock also conducted regular route operations between St. Louis and Louisville, via Vincennes, and operated over certain short-cut routes between Evansville and Indianapolis; it was then utilizing substantially more than twenty motor vehicles in its operations; at that time Globe was transporting general commodities in interstate or foreign commerce pursuant to two pending applications filed under the "grandfather" clause; under its application No. MC-3339, it claimed rights as a common carrier, serving all intermediary points, over routes in territory bounded on the east by Buffalo, New York and Pittsburg, Pa., on the south by Wheeling, West Virginia, Columbus and Cincinnati, Ohio, Louisville and Evansville, on the west by St. Louis and Peoria, Illinois, and on the north by Chicago, Detroit, Cleveland, Ohio, and Erie, Pennsylvania; in said proceeding the Commission considered only the operations of Globe as a common carrier and its findings therein were said by it to authorize the purchase only of Globe's rights to operate as a common carrier (R. 100).

The Commission found that by agreement dated November 4, 1941, Hancock would purchase the operating rights of Globe under Nos. MC-3339 and MC-3340 for $10,000, of which $100 had been paid as of the date of the agreement, and the remainder would be paid $2,500 upon approval of the transaction by the Commission, $2,500 upon final approval by the last of the concerned State Regulatory Authorities, and $4,900 within ten days thereafter, and that Hancock's stockholders had agreed to contribute sums equal to the purchase price at the times and in the amounts necessary to meet the payments required under the agreement.

Hancock's balance sheet as of September 30, 1941, showed assets aggregating $109,984; Globe's balance sheet as of the same date showed assets aggregating $166,153.

With certain exceptions, principally between Evansville and Prospect, Evansville and Indianapolis over certain short-cut routes, and Angola and Detroit, via Coldwater, Hancock's regular route operations were over routes duplicated by those claimed by Globe, the latter's operations, however, being considerably more extensive. Both carriers then served Louisville, Evansville, Indianapolis, Vincennes, Terre Haute, Detroit, St. Louis, and Chicago, among other points, and maintained duplicate terminal facilities at a number of such common points. Approximately 65 percent of Globe's traffic consisted of business handled for a forwarding company, and as a result its flow of traffic was unbalanced. As an example, Globe's traffic was heavier west into St. Louis than in the reverse direction, necessitating dead-heading of equipment from that point. Hancock, on the other hand, enjoyed heavier traffic east out of St. Louis than in the reverse direction. Globe did not believe it would be justified in expending additional funds in an effort to develop a

better balanced operation, and, as its functions and facilities substantially duplicate those of Hancock, the desired result could be accomplished through unification of the operations in Hancock. The unification would result in better balanced lading between the common points then served, and in certain instances, principally between Louisville and Chicago, Chicago and St. Louis, and St. Louis and Indianapolis, would provide Hancock with shorter routes. Hancock had the necessary organization to conduct the additional operations and would meet any increased equipment demands either by leasing additional equipment of owner-operators as at present, or by purchasing additional equipment. Savings through consolidation of overlapping functions, including terminal and pick-up and delivery facilities, application of Hancock's lower insurance rates, reduction in truck miles operated empty, and through increasing the use factor of vehicles operated by transporting heavier loads, were estimated to be in excess of $50,000 annually. No arrangements had been made respecting Globe's equipment, but it was the intention of the parties to dispose of all the assets and surrender its charter for cancelation. Globe's regular employees would be afforded an opportunity to join Hancock's organization. Other competitive common carriers of property then operated throughout the considered territory. The proposed unification is in line with our purpose of encouraging corporate simplication in the interest of economical and efficient transportation (R. 102).

The Commission found that the purchase by Hancock Truck Lines, Incorporated, of common-carrier operating rights of Globe Cartage Company, Inc., upon the terms and conditions above set forth, which terms and conditions it found to be just and reasonable, was a transaction within the scope of section 5 (2) (a) and would be consistent with the public interest, and that, if the transaction was consum-

mated, and pending determination of Globe's "grandfather" applications in Nos. MC-3339 and MC-3340, Hancock should be entitled to conduct the common-carrier operations lawfully conducted under the "grandfather" clause pursuant to those applications, and would be entitled to a certificate covering any "grandfather" common-carrier rights which might be confirmed as a result of those applications, which rights were therein authorized to be unified with rights otherwise confirmed in Hancock, with duplications eliminated (R. 104).

The lower court found as a fact that following said findings and order of the Commission of May 16, 1942, appellee, Hancock Truck Lines, Incorporated, in reliance on such findings and order, paid to Globe said $9,900, the balance of the purchase price for such common carrier operating rights (R. 72); it further found that in reliance upon said findings and order of May 16, 1942, appellee completely unified the common carrier operating rights of Globe which were to be confirmed by the Commission as a result of its grandfather applications aforesaid with rights otherwise confirmed in Hancock, with duplications eliminated, which rights at that time were the common carrier rights of Hancock pursuant to its certificates of public convenience and necessity theretofore granted to it by the Commission over the routes aforesaid; appellee thereafter continued to operate under said order of unification, and unified the common carrier rights of both of said companies as authorized by the Commission up to the time of the trial, to the extent and in the manner as set out in paragraph 18 of its complaint (R. 72); that is to say, as a result of such unification order of May 16, 1942, up to the time of the trial appellee had built up an annual business between Indianapolis, Indiana, and St. Louis, Mo.,

of approximately 13,200,000 pounds, 60% of which represented tonnage tendered to it by others than freight forwarders; between Louisville, Ky., and Chicago, Illinois, the approximate yearly tonnage was 34,660,000 pounds, 50% of which was that tendered to appellee by others than freight forwarders; from Cincinnati, Ohio, to Chicago, Ill., appellee was handling approximately 5,760,000 pounds of freight per year that was not moving on freight forwarder bills of lading; if that part of the order complained of is enforced appellee will at once be deprived of such valuable operating rights, and it will suffer a loss and damage of approximately $75,000 per year on account of the loss of revenue on said routes and will destroy appellee's right to receive general commodities direct from the true owners thereof (R. 9).

There was no issue as to these facts in the lower court; at the trial, it was admitted that appellee's business would be taken away from it, and appellants in Cause 448 said they had not raised any question as to these facts in their answers, and asserted that the matter of monetary damage was not in dispute; reference is made to page 92 of the Record, where the discussion arose as to the introduction of evidence by appellee on its allegation of irreparable injury and damage, for the following colloquy:

> "Judge Baltzell. You are admtiting, are you, that, if this is taken away, it would be taking their business away from them?
>
> Mr. Thomas. Yes sir; and we do say that, if the Court should find that this final order of the Commission is invalid and the Commission had no power in the premises to make it, it should be set aside. In other words, I think that takes care of this question of specific monetary damage.

Mr. Ward. Well, I don't want to be confronted with a moot question. I want this record to show that we are damaged.

Mr. Thomas. Neither of us raised that question in our answers.

Mr. Weiss. And you agree, now, that we don't have to submit proof on that?

Mr. Thomas. *If the Court finds that this order of the Commission is void, it should be set aside"* (emphasis supplied).

Mr. Thomas represented the Interstate Commerce Commission at the trial (R. 89).

## ESTOPPEL AGAINST COMMISSION

The Commission is bound by the same rules of estoppel which control individuals, and the rights of the parties must be determined upon the fixed principles of justice which govern between man and man in like situations; *United States v. Stinson* (1905), 197 U. S. 200; *Walker v. U. S.* (1905), 139 Fed. 409; *U. S. v. Denver* (1926), 16 Fed. (2) 374 (8 CCA); *State of Iowa v. Carr* (1911), 191 Fed. 257 (8 CCA); as the Court says in the *Stinson* case:

> "The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual."

In the *Walker* case, the court held that:

> "When the sovereign comes into court to assert a pecuniary demand against the citizen, the court has authority, and is under duty, to withhold relief

> to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case, work an estoppel against the Government."

We believe that if the facts in this appeal involved ordinary parties, and it was shown that appellee had been induced to expend $9,900 on the representations of its adversary that certain things would be done, and thereafter pursued a course of conduct prescribed by such adversary for a period of years, and, in so doing, changed its position to where its property and business to the extent of $75,000 per year would be destroyed if the adversary were allowed to change its course, this Court would have no hesitancy in enjoining such adversary from such wrongful conduct; the sovereign should not be permitted to successfully urge such procedure.

The authorities cited on page 19 of appellant's brief are not contrary to our position on this point; in *Cummings, Atty. Gen., et al. v. Societe Suisse Pour Valeurs De Metaux*, 85 Fed. (2) 287, the court properly held that the United States is not bound by the *unlawful action of its officers*, nor is it estopped by the acts of its agents in entering into an agreement which the law does not sanction or permit; in *United States v. City & County of San Francisco*, 310 U. S. 16, and in *Utah Power & Light Co. v. United States*, 243 U. S. 389, this Court held that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit;

we make no point as to these legal propositions; appellant *distinguishes our case* from those thus cited by it when it admits that the Commission acted within its rights in entering its order of May 16, 1942, under the express provisions of Section 5; no one claims that the Commission was not acting within its rights in entering the order of May 16th; the law expressly sanctioned such an order, upon the finding of requisite facts, and such facts were found; rights thus properly granted by the Commission are protected under the principles of estoppel.

It should be noted that *appellant makes no claim that the facts which we have set out would not be an estoppel as between ordinary litigants;* it only urges that estoppel cannot be urged against the Commission and the United States as a matter of law (p. 19 of their brief). We think the facts in this case operate as an estoppel against both the Commission and the United States.

## PART OF COMMISSION'S ORDER COMPLAINED OF VIOLATES FIFTH AMENDMENT

The order of May 16, 1942, was made by the Commission pursuant to Section 5 of the Interstate Commerce Act, upon notice and full hearing; such order clearly defined and furnished the foundation for the creation of certain property rights, and directed that certain things must be done by appellee; such property rights can not now be destroyed by the Commission by any order made by it in this proceeding; a hearing and decision under Section 5 can not be confounded and intermingled with a hearing on an application under Section 206; the issues are entirely different; the order entered under Section 5 was very comprehensive, and not only impliedly author-

ized, but directed, appellee to pay Globe $9,900 for its common carrier operating rights, unify its common carrier rights with those of Globe, and eliminate duplications of traffic, all of which was said by the Commission in that proceeding to be consistent with the public interest; such order can not now be collaterally set aside by the Commission; a change in such order can only be made "for good cause shown", as provided by (9) Section 5; the Commission found that it was "just and reasonable" to encourage appellee to spend its money in the elimination of overlapping functions, and reduce the mileage of empty truck operations, in the "interest of economical and efficient transportation." But what has happened in the meantime to change all of these things which were so commendable on May 16, 1942? Nothing, except in August of 1943, the Commission found that on June 1, 1935, Globe was in fact a common carrier of general commodities as defined by the Interstate Commerce Act, but it was then only receiving freight from freight forwarders; this is the sole excuse of the Commission for writing the order complained of limiting appellee's operations to the receipt of freight from freight forwarders; but its order of May 16th was based upon a finding by the Commission that the proposed unification transaction was "consistent with the public interest" and its "terms and conditions" were found by it "to be just and reasonable" (Section 5 (b). Before such order of May 16, 1942, can be set aside, or its virility nullified by any subsequent action of the Commission, the appellee is entitled to notice of any hearing to be had by the Commission for any such purpose and entitled further to be fully heard thereon. It has had no such notice and no hearing, our position being that such an action is not properly included within the application for a certificate under the grandfather clause of Section 206, and was not

within the issue tendered by Globe's application; consequently, the present order of the Commission will clearly deprive the appellee of its property without due process of law, in violation of the Fifth Amendment. It has had no notice and no opportunity to be heard upon the question as to whether it is consistent with the public interest, and just and reasonable for it to go back to, and hereafter occupy, the unfortunate financial dilemma from which it, under the unification order of the Commission, extricated Globe in 1942; pursuant to which order it has built up a substantial business, and before appellee can be compelled to re-establish duplications in the transportation service, and the dead-heading of empty trucks, which useless and unnecessary acts were eliminated by the order of May 16th, it must have a lawful hearing on those issues and upon the conditions in relation thereto as they are found to exist at the time of such hearing, upon the theory of reasonableness and consistency with the public interest. The Commission can not destroy these rights by an indirect or collateral order.

In *McClean Trucking Co.* (1943), 321 U. S. 67, this Court upheld a unification order made by the Commission because it had found and determined that the proposed consolidation was "consistent with the public interest," and the terms and conditions thereof were "just and reasonable," and that these were matters which were peculiarly within the power of the Commission to determine. On May 16, 1942, the Commission found and determined that these salutary statutory conditions existed as to the consolidation of Globe's common carrier rights with those of appellee; the question now before the Court is:

> Can the Commission, after having authorized such unification on such findings and conclusions,

> enter a collateral order which will destroy the improved transportation service obtained thereby, and which will confiscate and destroy appellee's property!

We most sincerely urge that the Fifth Amendment forbids such action by the Commission, and before any such changed order can be entered by it there must be proper notice given to appellee, and an opportunity to be heard, and there must then be a finding by the Commission that such changed order will be consistent with the public interest, and likewise be just and reasonable.

This Court summarized certain of the matters which the Commission found had properly entered into the consolidation order in the *McClean* case as follows:

> "The higher load factor on trucks, reduction in the number of trucks used and the mileage traversed would lead to more efficient use of equipment and save motor fuel. Terminal facilities would be consolidated and used more effectively, through movement of freight would reduce costs and in a multitude of other ways the stability and safety of the service rendered would be enhanced."

These matters bear especially upon whether the merger is consistent with the public interest. It is equally important that the findings show that the order will be "just and reasonable"; this provision is primarily for the protection of the property rights of the carriers involved; conceivably, it might be consistent with the public interest to require the carrier to dead-head trucks, travel with empty vehicles at times, and maintain some duplications of facilities, but this would not justify the Commission in making an order compelling it to do so, unless it was also found that it was a just and reasonable requirement.

In the instant case, the Commission made and entered consolidation order on May 16th, 1942; appellee thereupon invested its $9900 on the strength of such order; it unified the service; it improved the transportation; gave greater efficiency of operation; avoided duplications; reduced the empty truck miles traveled; balanced the traffic, and enhanced the stability and safety of the public service rendered; in so doing, and as expected and intended by the Commission (as it was in line with the Commission's purpose of encouraging corporate simplification in the interest of economical and efficient transportation), appellee built up a common carrier transportation service, which, at the time the judgment was rendered below, amounted to many thousands of dollars annually, and moved each year 7,920,000 pounds of freight between Indianapolis and St. Louis, 17,330,000 pounds between Louisville and Chicago, and 5,760,000 between Cincinnati and Chicago, none of which was received by it from freight forwarders, and all of which is to be wiped out, if the order complained of herein is permitted to stand.

The order of May 16, 1942, is a vested property right of appellee, and it cannot be taken away from it, except in the manner provided by law; appellee cannot be divested thereof by any hearing or proceeding had under Section 206; the issues of "consistency with the public interest" and whether it is "just and reasonable" to thus destroy its business are not within the purview of Section 206, and such issues must be presented, heard upon notice, and properly decided before such vested property rights and its business shall be taken away from it. We believe that as long as the order of May 16th remains in force, and it will so remain until a direct attack is made thereon, it confers contractual rights which are vested in appellee,

and which cannot be taken from it except in the manner provided by law; the Fifth Amendment forbids such procedure. *Lynch v. United States* (1933), 292 U. S. 571.

## PART OF COMMISSION'S ORDER COMPLAINED OF VIOLATES SECTION 206 (a)

The Commission found that Globe had been engaged in bona fide operations, without interruption, since prior to June 1, 1935, transporting by motor vehicle for compensation, in interstate or foreign commerce, general commodities, with immaterial exceptions; it found that Globe was a common carrier by motor vehicle and that it was entitled to authority to continue operations as such; it found that it was without power to restrict or limit Globe's operations in a manner which would change its status from that of a common carrier (R. 68); having found such facts, it was the mandatory duty of the Commission to issue an unlimited certificate to appellee; appellee was either a common carrier or it was something else; the Commission found that it was a common carrier, and it had the power to so find; the Commission had no lawful right to deny appellee the certificate which Congress has said it was entitled to, pursuant to that part of Section 206 (a) which reads as follows:

> "If any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, . . . *the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation and without further proceedings*" (emphasis supplied).

Just how Congress could have couched the duty of the Commission in plainer language is hard to understand: if the applicant was a bona fide common carrier, no further proceedings were proper to determine whether it was at that particular date receiving freight only from a portion of the public known as freight forwarders (a shipper and consolidator of freight for the general public); if it was a common carrier, it was engaged in the transportation by motor vehicle in interstate or foreign commerce of property for compensation, and under the law it had the right to thereafter expand its business as such to include the transportation of freight tendered to it by all shippers; this was not only recognized by the Commission as being proper in its order of May 16, 1942, but the Commission found it was advisable to augment the common-carrier rights of Globe by unifying them with the common-carrier rights of appellee; under these undisputed facts, the Commission had no lawful right to place the limitation complained of in appellee's certificate.

In *United States v. Maher* (1939), 307 U. S. 148, this Court said:

> "But under Section 206 (a) the Commission must issue 'such certificate without requiring further proof that public convenience and necessity will be served' by an applicant who 'was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time'."

The facts thus referred to by this Court were found by the Commission to exist, and it had no authority, under 206 (a) to limit the certificate to freight moving on bills of lading of freight forwarders. It was required to issue

a certificate as a common carrier—"without further proceedings."

## PART OF COMMISSION'S ORDER COMPLAINED OF IS VIOLATIVE OF SECTION 216 (d)

The Court found that appellee, as a common carrier of property by motor vehicles, has and does provide safe and adequate service, equipment, and facilities for the transportation of general commodities in interstate and foreign commerce, and has established, observed, and enforced just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto, and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property, and has fully complied with all the rules and regulations of the Commission in relation thereto in so far as they were in effect at that time (R. 70).

The Commission found that appellee was a common carrier, both in 1942 and in 1943; being in fact a common carrier, appellee is prohibited by Section 216 (d) from giving any undue or unreasonable preference or advantage to any person in any respect whatsoever; it could not accept freight from one class of shippers, and decline it from other classes; it could not decline to receive freight properly tendered to it by owners of property as distinguished from agents or freight forwarders; not only its rights, but its duties, are fixed by law, and for a violation thereof it is subject to the imposition of penalties; the Commission can not lawfully, under Section 216 (d), place appellee in such inconsistent position.

## VOID PART OF COMMISSION'S ORDER COMPLAINED OF IS CAPRICIOUS

No reason other than mere caprice can be advanced for that part of the order complained of; on May 16, 1942, the Commission entered a solemn finding that the handling of freight by Globe which was restricted to freight-forwarder business, unbalanced the flow of traffic of Globe, and that it would have cost Globe approximately $20,000 to overcome such situation in 1942; it *found that by the unification of Globe's traffic with the appellee's traffic, economical transportation would be supplied, duplications of service avoided, and the combination of these would be consistent with the public interest.* (R. 102-103-104.)

*Now*, it proposes to compel appellee, *as a common carrier*, to go back to the carrying of freight tendered only by freight forwarders, and thus lose its money, have its business and property destroyed, completely disorganize the economical transportation which it found would result from unification, and wholly disregard its former finding that such unification would be consistent with the public interest; such an order, without facts and reason being found to support it, must fall within the realm of mere caprice, and should not stand; it will place appellee in a worse position than Globe occupied in 1942; Globe was then losing money and carrying on an unbalanced business with only 65% of its commodities being received from freight forwarders; but appellee can accept no property at all except from freight forwarders; such conduct seems to emphasize the lack of apparent motivation, and at least implies wantonness; the void portion of the Commission's order complained of is capricious, and should be enjoined.

## VOID PART OF COMMISSION'S ORDER COMPLAINED OF IS UNREASONABLE

The limitation complained of is clearly unreasonable; if enforced, all of the busines which appellee has built up under the unification order of May 16, 1942, will be destroyed; appellee will be compelled to go back to a transportation business which was, and will be, unbalanced, necessitating the dead-heading of equipment, especially from St. Louis east; it will be compelled to duplicate operations over routes covered by its other certificate; it must give a duplicate operation between Louisville, Evansville, Indianapolis, Vincennes, Terre Haute, Detroit, St. Louis, Chicago, and other points; the saving in overlapping functions, including terminal and pick-up and delivery facilities, reduction in truck miles operated, and through increasing the use factor of vehicles transporting heavier loads, and which were estimated by the Commission to be in excess of $50,000, will all be lost to appellee (R. 70-71-72).

In 1942, the Commission found that it was "just and reasonable" for appellee to pay Globe $10,000 for the common-carrier operating rights involved in this proceeding: it found that it was "just and reasonable" to eliminate duplicate terminal facilities then maintained by Globe and appellee; it found that it was "just and reasonable" to eliminate Globe's unbalanced traffic which was caused solely by the fact that 65% of its business was received from freight forwarders; it found that it was "just and reasonable" to avoid the dead-heading of equipment by Globe; it found that it was "just and reasonable" to save $50,000 annually by the consolidation of overlapping functions, reduction in truck-miles operated empty, and the factor of operating vehicles with heavier loads;

it found that all of these things were "in line with its purpose of encouraging corporate simplification in the interest of economical and efficient transportation"; it found that all thereof would "be consistent with the public interest" (R. 103-104). If these matters were "just and reasonable" then, they are just and reasonable now; if they are just and reasonable now, then the limitation of which we complain is a most astounding and startling exhibition of unreasonableness, because it will force appellee back to the unfortunate position of Globe, without restoring the $10,000 which appellee paid to Globe, and compel appellee to carry on the losing business of handling freight tendered to it only by freight forwarders, going back once more to dead-heading, duplicating routes and services, moving partially loaded trucks, and traveling many unnecessary empty truck-miles.

We submit that the Commission has neither power nor authority to promulgate such an unreasonable order, and thus destroy the business and property of appellee.

When all of the facts in this case are considered it will be found that the part of the order complained of is so capricious, arbitrary, and unreasonable as to shock the conscience of the Chancellor, and the order should not stand.

## JUDGMENT OF DISTRICT COURT IS NOT VIOLATIVE OF COMMISSION'S ADMINISTRATIVE FUNCTIONS

On page 14 of its brief appellant makes the point that the District Court erred in setting aside the portion of the Commission's order containing the limitation to commodities moving on bills of lading of freight forwarders, while leaving the rest of the order in force. This was

proper practice, and did not amount to the exercise of an administrative function conferred on the Commission by Congress; the Commission's order was clearly divisible; the void and illegal part could be very readily separated from the valid portion; the Commission found appellee to be a common carrier within the provisions of the grandfather clause in section 206 (a); it was thereupon its mandatory duty to issue appellee a certificate, without limitation, and without further proceedings; having failed to comply with the law, and the limitation being void, appellee was clearly within its rights in rejecting the void part of the grant, and accepting the valid part. This method of procedure is clearly established and recognized in *United States v. Chicago, M. St. P. & R. Co.* (1930), 282 U. S. 311, wherein the court says:

> "It long has been settled in this court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possess the unqualified power to withhold the grant altogether, does not annul the grant. The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant."

## REMAND IS NOT PROPER REMEDY

But, on page 4 of its brief appellant suggests that if the Commission's order was based upon an improper application of legal standards, the case should have been remanded to the Commission for further proceedings. All that the Commission could have done upon such remand would be to remove the objectionable limitation from appellee's certificate: this the court could do as well as the Commission; no complaint was made as to the facts actually found by the Commission; neither party to this

action claimed in the lower court that the Commission had not found as a fact that appellee was a common carrier within the purview of the grandfather clause; it was conceded that the Commission also found that appellee had the right to continue operations as a common carrier, and that the Commission was without power to restrict or limit its operations in a manner which would change its status from that of a common carrier; the facts in relation to and surrounding the making of the Commission's order of May 16, 1942, are not in any manner in dispute; our claim is that the Commission misapplied the law applicable to an uncontroverted and undisputed state of facts; in such situation, we think it would be highly improper to remand the cause to the Commission, and the lower court certainly would have been derelict in its judicial duty if it had shirked the responsibility of enjoining a void order on undisputed facts; in applying the law to the facts found by the lower court, no further weighing of evidence was required; no administrative function remained; no intricacies of the transportation problems were then involved; all questions of fact were settled; no suggestion is made by appellants that any further facts were to be found by either the court or the Commission; in fact, nothing remained for the Court to do but to apply the fixed principles of justice and law which govern between man and man in situations of this character; this is what the court did, and there is no reason for remanding the cause to the Commission for further proceedings. In the *Carolina Freight Carrier's Case*, supra, this Court held that it was no intrusion into the administrative domain of the Commission for the Court to strike down the void limitations which were placed in the certificate by the Commission; it was said to be an

insistence upon the observance of those standards which Congress has made "prerequisite to the operation of its statutory command"; that cause was not referred back to the Commission. In the *Chicago M. St. P. & P. R. Co.*, supra, the cause was not remanded, but the order was enjoined.

Furthermore, upon a remand of this case, the Commission will have no power in this proceeding to enter any order which will change its order of May 16, 1942.

## WAIVER

But appellant urges on page 20 that appellee waived objection to the restriction limiting it to the carriage of traffic moving on bills of lading of freight forwarders.

Our position as to such alleged waiver is:

(1) The right and duties imposed upon plaintiff as a common carrier impressed the matter of limitation of such rights and duties with a public duty which could not be legally waived by plaintiff, as such limitations are governed and controlled only by legal provisions and requirements; a common carrier can not waive provisions concerning its duty to the shipping public, as such waiver is prohibited by law.

Title 49 U. S. C. A., Sec. 316.

(2) It is contrary to public policy to permit the Commission to promulgate a void order, one which will cause plaintiff to sustain irreparable damage, and then allow the Commission to urge that the plaintiff waived its right to object to such illegal order; the Fifth Amendment provides that plaintiff shall not be deprived of its property

without due process of law, and every reasonable presumption should be indulged against such waiver.

*Hodges v. Easton*, 106 U. S. 408.

We urged below, and repeat now, that it is improper for the Commission to set up a void order, and one which it is admitted will confiscate appellee's property, and then be heard successfully to urge that appellee waived its legal right to present such void order to a court for its injunctive relief (R. 98). Such procedure is clearly contrary to public policy. Such facts do not constitute a waiver.

(3) No issue was properly tendered of any waiver by the appellee; we objected to the introduction of evidence offered in support of such claim of waiver, because the answer does not contain the facts necessary to present such issue (R. 98); the statements in the answer which attempt to present such issue are nothing but conclusions of law of the pleader, with no facts whatever to support the same (our objections to defendant's Exhibit 5, R. 98).

*Facts constituting* an estoppel (or waiver) must be pleaded specially, in order that the question of whether a party is estopped to act in a certain manner may be put in issue; *Town of St. John v. Gerlach* (1926), 197 Ind. 289; 150 N. E. 771;

> "To claim an estoppel (or waiver) in so many words is merely to state a conclusion of law"; *City of Ironton v. Harrison Const. Co.* (1914), 212 Fed. 353 (6 CCA).

(4) Before there can be a waiver, there must be an existing right; appellee could not waive a right which did not exist; the Commission had denied its right to receive freight generally from shippers, and appellee gave up

nothing in connection with its claim to the right to transport general commodities; consequently, there was no waiver; Vol. 27, R. C. L., Sec. 5, p. 908.

(5) To make out a case of waiver of a legal right, it must be shown that such waiver is supported by a valuable consideration, or the fact relied on as a waiver must be such as to estop the party from reasserting the matter so alleged to have been waived; no such facts are pleaded, proved or claimed by appellants in this case.

*Victor Products Corp. v. Yates* (1932), 54 Fed. (2) 1062 (4 C. C. A.);

*Hasler v. West India* (1914), 212 Fed. 862 (2 C. C. A.);

*Hunter Milling Company v. Koch* (1936), 82 Fed. (2) 735 (10 C. C. A.).

(6) The act relied upon to prove waiver must be shown to have been voluntarily done, with intent to waive, and in the absence of particularly urgent circumstances; the conclusion of waiver asserted in the answer was in connection with the issue then pending before the Commission wherein the appellee was seeking authority over approximately 83 different routes (including alternates), approximately 60 of which had been denied by the Commission; in addition to denying such routes, the Commission had restricted appellee to the receipt of freight on the remaining 23 granted routes from freight forwarders only; in such situation, the appellee was compelled to weigh and evaluate the ultimate rights which would inure to it by the further action of the Commission, and for procedural purposes solely in connection with its application for reconsideration, it took the position that it preferred to have a grant over the approximate 83 routes; it was unsuccessful in its position; the most that can be

said is that for the purpose of the reconsideration, appellee proposed that if its 83 routes should be granted, it would give up its right to contest further the restriction which the Commission placed upon it; but it was unsuccessful, and there is no consideration for the claim now that it waived its right to contest such restriction in this subsequent independent action; that the alleged waiver was not voluntary, and was expressly conditioned upon its receipt of a certificate over the 83 routes, is plainly disclosed by the language used in connection therewith, appearing on page 143 of the Record, where appellee urged that:

> "*To maintain our very life as a carrier,* as a minimum, in view of the curtailment and limitation to the hauling for freight forwarders only, we believe that we are entitled to no less than the right to use all convenient routes as set forth in Exhibits 30 and 31."

Thus, the failure of the Commission to grant appellee a certificate over the 83 routes applied for, very clearly released the appellee from its suggestion that it would contest no further on the question of restriction; in other words, appellee was unsuccessful in its position, the Commission yielded no ground, and there is no basis for the claim of waiver.

*Bowerman v. Detroit Free Press* (1939), 287 Mich. 443, 283 N. W. 642.

## COMMISSION DID NOT FIND THAT GLOBE WAS NOT HOLDING ITSELF OUT TO TRANSPORT PROPERTY FOR ALL SHIPPERS

Appellant argues that the Commission's finding that during the "grandfather" period appellee's pred-

ecessor in interest transported no commodities other than those moving on bills of lading of freight forwarders and this statement can not be challenged by appellee; but this does not reach our question; however, the Commission itself challenged it by its finding and conclusion in its order of May 16, 1942, that Globe was transporting only 65% of its total for freight forwarders; we say the Commission found as a fact that appellee's predecessor in interest was a bona fide *common carrier by motor vehicle* of general commodities, prior to, on, and ever since June 1, 1935, and it found as a fact *that it could not restrict its services to particular shippers, and that it was without power to restrict or limit its operations in a manner which would change its status from that of a common carrier* (R. 68).

The term "common carrier by motor vehicle" is defined by Clause (14), Section 203, Part II of the Interstate Commerce Act to be any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of property for compensation; it must be assumed that the Commission made the above finding advisedly and with an understanding of such definition; the Commission made no finding that appellee's predecessor was not holding itself out to the general public to engage in transportation by motor vehicle in interstate or foreign commerce of property for compensation; in the absence of a finding of this character, it can not now be said that simply because it had no shippers on June 1, 1935, except a freight forwarder, it must now be limited to receiving freight from freight forwarders in the future; it did have other business, because the Commission found on May 16, 1942, that 65% of its business was received from a freight forwarder,

and the balance from general shippers; having been a bona fide common carrier by motor vehicle on June 1, 1935, it can not be limited to the exact number of customers it had on that date; nor can the shippers which it was then serving be designated as a class, and become the only class which could be served by appellee. As this Court said in *United States v. Carolina Freight Carriers Corp.*, (1942), 315 U. S. 475, it is not proper to freeze the operation of appellee into the precise pattern of its predecessor's activities on June 1, 1935; especially is this true in view of the unification order of the Commission of May 16, 1942.

## SUBSTANTIAL PARITY

The "substantial parity" referred to in appellant's brief has no relation to or connection with the question at hand, for, in none of the cases cited did the Court have before it a previous order of the Commission affecting the rights of the same parties such as the one of May 16, 1942; in the *Alton* case the question was whether the applicant was a bona fide operator on June 1, 1935, it being shown that he was operating on highways in defiance of state law; the Court sustained the Commission's finding that he was not a bona fide operator; in the *Carolina* case, the court enjoined the Commission from placing unauthorized limitations in the certificate, such as the elimination of commodities, which, though of the same general class as the others, had been carried before, but not after June 1, 1935, and the limitation to those commodities which prior to June 1, 1935, had been carried in substantial amounts and with a degree of regularity; we think the Court held in the *Carolina* case that limitations such as we complain of herein are unlawful;

to require appellee to go back and haul empty and partially loaded trucks, as Globe was doing in 1942, and carry on Globe's former unbalanced transportation system, will drive the enterprise of appellee to the wall, and ruin it; this is what this Court in the *Carolina* case concluded could not be done by the Commission; the *Noble* case related to a contract carrier, where a different statutory standard is the guide for the Commission, the applicant wanted to haul certain commodities for any one who desired to use its service, and the Court approved the principle that a highly specialized contract carrier of fresh meats, canned goods, and dairy products for particular concerns could not properly have his business extended *to that of a common carrier of general commodities;* in the *Crescent* case, the Court held that to grant the applicant the right to change his business from sedans to that of carrying passengers by bus would alter the position in the transportation system which he occupied on June 1, 1935; none of these cases had anything to do with an order like the one of May 16, 1942; *and none of them had anything to do with the division of shippers into different classes; property may be classified,* but *shippers of commodities can not be arranged in classes consisting of owners in one class and agents or freight forwarders in another* for the purpose of limiting the rights of a common carrier to the hauling of only general commodities tendered by those classified as agents or freight forwarders; *a common carrier can not be limited in transportation of commodities tendered to it only by agents;* a common carrier has the legal right, and it is under a legal duty, to contract with and receive general commodities either from the owner thereof, or his agent, and the order of the Commission restricting such common carrier to the receipt of

general commodities tendered only by agents, is an illegal, unjustifiable, and arbitrary limitation upon the enjoyment by appellee of its property rights; *New State Ice Co. v. Liebman* (1932), 285 U. S. 262; *Covington Stock Yards Co. v. Keith* (1890), 139 U. S. 128; such limitation is prohibited by Section 216 (a) and (d), Part II of the Interstate Commerce Act, Section 316, Title 49 U. S. C. A.

On page 19 appellants say that Section 208 (a) authorizes the Commission to make the limitation found in the order complained of; we do not agree with this statement; the only terms, conditions or limitations that can be placed in a certificate are those which "the public convenience and necessity may from time to time require"; appellant makes no claim that the public convenience or necessity require any such limitation, and its contention in this regard but further emphasizes the fact that the Commission did not properly apply the law in this case. Even though there could have been a question as to "the convenience and necessity", the Commission was nevertheless mandated by the statute to issue the certificate to appellee "without further proceedings" (Section 206).

## FINDING NO. 14

On page 30 of appellant's brief complaint is made as to Finding No. 14 of the lower court, it being said that there was no evidence to prove the matters set out therein; Finding 14 covers paragraph 16 of our complaint (R. 7); there was no dispute as to the facts involved in this Finding; the answering defendants said the allegation was immaterial and at the trial took the same position; from the discussion that took place the court was clearly within its right in adopting Finding 14; the appellant in this appeal

filed no answer, and tendered no issue; it took no part in the discussion and did not raise this question in its assignment of errors nor in its points to be relied upon.

## FINDINGS NOS. 15, 16, 17, and 18

Appellant urges that the court exceeded its jurisdiction as to Findings No. 15, 16, 17 and 18 (R. 70, 71, 72); it made no request of the court below to change these or any other Findings; these particular Findings are based upon paragraphs 13 and 18 of our complaint (R. 5-8, 9), which relate to the facts concerning the unification order of the Commission of May 16, 1942; it is not claimed by appellant that the Findings do not set out the facts; it is said that such facts were not in issue; if such facts are immaterial, they can do the appellant no harm; there are direct allegations in the complaint concerning the facts set out in such Findings (R. 5-8, 9), and appellee was entitled to appropriate Findings, if supported by the evidence, to sustain its theory of the cause of action.

## COURT BELOW DID NOT EXCEED ITS JURISDICTION

Appellant has not accurately stated the full measure of appellee's attack on the order of the Commission on page 28 of its brief.

The evidence introduced before the Commission was not introduced at the trial below; the findings and order of Division 5 to the effect that an unlimited certificate should issue to appellee is in the Record (R. 22-89); the finding and order of the Commission of August 3, 1943, is in the Record (R. 40-46-89). From an examination of these

instruments, the lower court found that *the Commission had failed to find:*

A. That the restriction complained of in the complaint is a reasonable term, condition or limitation required by the public convenience and necessity (Section 208).

B. That it failed to find that it would be consistent with the public interest to place such restriction in said order (Section 5).

C. The Commission failed to find that good cause exists for changing its order of May 16, 1942 (Section 5).

D. The Commission failed to find that it is just and reasonable to place such restriction in such certificate (Section 5).

The court further found:

E. That part of the order complained of is not sustained by any fact found by the Commission.

F. That part of the order complained of has no rational basis for its support.

G. That part of the order complained of is discriminatory against appellee.

H. That part of the order complained of is an arbitrary, unreasonable and capricious restriction upon the rights, duties and privileges of the appellee as a common carrier of general commodities by motor vehicle for compensation.

I. That part of the order complained of will deprive plaintiff of its rights and property without due process of law (Finding No. 19, R. 73).

These are all factual matters, and, strange as it may seem, neither the appellant in this appeal, nor the appellants in Cause No. 448, have pointed out in their briefs where the lower court has made any mistake as to the facts actually found by it; if the Commission did find the facts which the lower court says are missing, as recited in A, B, C, and D, it would be appropriate for appellants in either of these appeals to point out the place in the Record where they may be found. The matters referred to in E, F, G, H, and I, are undoubtedly predicated upon an examination of the findings and order of the Commission of August 3, 1943, and a comparison thereof with the order of the Commission of May 16, 1942; such examination clearly discloses the discriminatory character of that part of the order complained of, portrays its arbitrary nature, demonstrates its unreasonableness, and boldly emphasizes the sheer caprice which has entered therein; it is admitted by all parties that the part of the order complained of will destroy appellee's business and property.

There is only one conclusion to draw from these undisputed facts: that part of the order complained of is void, and should be stricken out of the certificate.

## CONCLUSION

We believe this Court has no jurisdiction to decide this case upon its merits; but, if the Court concludes otherwise, we sincerely urge that the judgment should be affirmed.

Respectfully submitted,

JACOB WEISS,
518 Insurance Building,
8 East Market,

ALBERT WARD,
318 Insurance Building,
8 East Market,

FERDINAND BORN,
718 Chamber of Commerce Bldg.,

All of Indianapolis, Indiana,

*Attorneys for Appellee.*

# SUPREME COURT OF THE UNITED STATES.

Nos. 448 and 449.—October Term, 1944.

448 United States of America and Interstate Commerce Commission, Appellants, vs. Hancock Truck Lines, Inc.

449 Regular Common Carriers Conference, Appellant, vs. Hancock Truck Lines, Inc.

Appeals from the United States District Court for the Southern District of Indiana.

[April 23, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

The appellee is a motor carrier. With the approval of the Interstate Commerce Commission it acquired the operating rights of Globe Cartage Company, another such carrier, which then had pending before the Commission an application for a certificate of convenience and necessity under §§ 206(a) and 209(a) of the Interstate Commerce Act.[1] The appellee prosecuted the application as Globe's successor to obtain a certificate authorizing the exercise of Globe's so-called "grandfather" rights, that is, to continue Globe's operations as they were conducted July 1, 1935.

The Commission made an order awarding a certificate to appellee as a common carrier, but for less than all the routes embraced in the application and restricting appellee's operations to traffic moving on the bills of lading of freight forwarders.[2] The record discloses that the appellee filed a petition for reconsideration, in which it pressed for amendment of the order as respects the routes permitted, but waived objection to the restriction of its traffic to service of freight forwarders. It stated: "We do not challenge, nor do we complain against, the restriction to serve only freight forwarders." There is more to the same effect. The Commission denied the petition.

[1] 49 U. S. C. §§ 306(a), 309(a).

[2] 41 M. C. C. 313; 42 M. C. C. 547.

The appellee brought suit[3] to set aside and enjoin only so much of the Commission's order as restricted its operations to traffic moving on bills of lading of freight forwarders. A district court of three judges heard the case, and issued a permanent injunction as prayed. One of these judges allowed an appeal to this court on a petition filed by the appellants more than thirty, but less than sixty days after entry of the decree. The appellant in No. 449 intervened before the Commission in opposition to the appellee's application, and was permitted to intervene as a defendant in the court below. No circumstance differentiates its status from that of the appellants in No. 448, and what is said concerning that case may be taken as applicable to No. 449.

The appellee moved to dismiss on the ground that the appeal was not timely taken and was improperly allowed by a single judge. We postponed the question of our jurisdiction to the hearing on the merits. After argument and upon consideration we find ourselves in the anomalous position that whereas we hold we have jurisdiction, we cannot pass upon the substantive question of the statutory power of the Commission which is the ground of appeal.

*First.* Since the appeal is from the final decree of a statutory court of three judges, and not from the entry of a preliminary injunction the period for taking an appeal is sixty days,—not thirty days as appellee contends.

When by the Act of October 22, 1913[4] the Commerce Court was abolished and its jurisdiction transferred to district courts, definite provision was made for direct appeal to this court, within thirty days, from an order granting or denying an interlocutory injunction in a suit to set aside an order of the Commission. In a later sentence the Act declares "A final judgment or decree of the district court may be" likewise reviewed "if appeal . . . be taken . . . within sixty days" after entry. The appellee's contention, as we shall see, rests on the assumption that when the Act speaks of a final decree, it is addressed to final decrees in cases other than those brought to set aside orders of the Commission. But we think this reading incorrect. The paragraph as a whole deals with the same type of suit.

On this erroneous assumption the appellee insists that when the Act of February 13, 1925[5] restricted direct review of district court

[3] Pursuant to 28 U. S. C. §§ 41(28), 45-48.

[4] 38 Stat. 208, 219-220.

[5] 43 Stat. 936.

judgments in this field by repealing various earlier legislation, but saving from repeal "so much" of the Act of 1913 "as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders" of the Commission, the sentence of the earlier Act applicable to final judgment was repealed because it did not deal with judgments in suits to set aside Commission orders. The argument is, to some extent, based on the fact that when the United States Code was compiled the sentence of the Act of 1913 dealing with appeals from interlocutory injunctions became § 47 of Title 28 and the sentence dealing with appeals from final judgments was omitted from the Title. The omission was corrected in 1934 by inserting the latter sentence as § 47a.[6]

The face of the statutes, the uniform practice of this court[7] and the legislative history[8] make against the contention that appeals from final decrees in the class of cases in question must be taken within thirty days.

*Second.* We hold the objection that appeal was allowed by but one of the three judges who composed the district court is untenable. The Act of October 22, 1913 (*supra*) requires that in a case such as this both the hearing in respect of an interlocutory injunction and the final hearing shall be by three judges.[9] It says nothing as to who shall allow an appeal. Since appeal is of right, allowance would seem to be but a ministerial act which might be performed by any member of the court. Our past practice has apparently sanctioned such an allowance. But if the proper procedure was formerly a matter of doubt, such doubt has been removed.

Section 3 of the Act of April 6, 1942[10] provides that in such a case as this a single judge may "enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time", with a proviso not here relevant. There is a further proviso that his action shall be sub-

[6] A like correction was made in § 345.

[7] Reference to the records of the court discloses that it has repeatedly entertained appeals taken more than thirty but less than sixty days after entry of final judgment.

[8] Hearings H. R. 8206, 68th Cong., 1st Sess., p. 15; Senate Report on S. 2060, 68th Cong., 1st Sess., p. 16.

[9] See 28 U. S. C. § 47.

[10] 56 Stat. 198, 199; 28 U. S. C. § 792.

ject to review "at any time prior to final hearing", by the court as constituted at final hearing. This, however, is obviously inapplicable to action taken subsequent to final hearing. Rule 72 states that an appeal to this court from a district court shall be allowed "as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal." Rule 36 of this court authorizes a single judge of a district court to grant such an appeal.

*Third.* The court below held that the Commission erred in granting appellee a certificate as a common carrier and limiting its right thereunder to carriage of goods consigned by freight forwarders. This is the holding the appellants challenge. We are of opinion that the record precludes consideration and decision of the question.

As has been stated, the appellee in its petition for reconsideration by the Commission, expressly waived objection to that portion of the order which limited operations to traffic moving on bills of lading to freight forwarders. The Commission's answer to the complaint in the district court recited the filing of that petition, and alleged that in it "the plaintiff limited its objections to said report and order, to the Commission's prescription of the routes over which operating authority was granted therein, expressly waived objection to, and did not challenge or complain against the restriction of the transportation authorized to commodities consigned by freight forwarders and gave up all claim to the right to transport general commodities not so consigned." To this answer the appellee filed a reply consisting of one paragraph in which it denied the allegation above quoted, without explanation or elaboration.

The Commission and the United States filed in the court below a request for findings of fact which included a requested finding reciting the filing of the petition for reconsideration, and stated the "sole error alleged against the Commission was that it granted authority for operation only as to a portion of the routes and between some of the points and places specified in the application. In said petition the plaintiff further stated that it did not challenge nor complain against the restriction of the service authorized to the transportation of commodities which are moving on bills of lading of freight forwarders." The court made no such finding.

The only assignment of error which may be said to attack the failure so to find is one couched in general terms. It is: "The District Court erred . . . 4. In refusing to adopt the findings of fact and conclusions of law submitted by the defendants."

Putting to one side the question whether such an assignment is too general and broad to support a challenge to the court's failure to find as requested, and despite the fact that, neither on brief nor in oral argument, did the appellants' counsel press for reversal on that ground, we think the district court committed reversible error, of which we must take note, in passing on the merits of the case made by the appellee.

It was manifestly improper to reverse the Commission's order in respect of a provision therein as to which the suitor had advised that body it no longer objected but acquiesced. The record disclosed this situation, the defensive pleading relied upon it, and the court was asked to dismiss because of it. The complaint should have been dismissed. The judgment is reversed.

Mr. Justice BLACK concurs in the result.